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Before The  
**Federal Communications Commission**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
(OFFICE OF SECRETARY)

In the Matter of

ADVANCED TELEVISION SYSTEMS  
AND THEIR IMPACT UPON THE  
EXISTING TELEVISION BROADCAST  
SERVICE

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MM Docket 87-268

To: The Commission

REPLY COMMENTS  
OF THE  
MINORITY TELEVISION PROJECT, INC.  
AND  
SUNGILT CORPORATION, INC.

Respectfully submitted,  
MINORITY TELEVISION PROJECT, INC.  
AND SUNGILT CORPORATION, INC.

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AND  
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Minority Television Project, Inc. ("MTP"), licensee of non-commercial television station KMTP-TV, Channel 32, San Francisco, California, and Sungilt Corporation, Inc. ("Sungilt"), holder of a construction permit for KXGR-TV, Channel 46, Green Valley-Tucson, Arizona, a Warner Bros. (the "WB") affiliate, hereby submit their Reply Comments in the above-captioned proceeding.

**I. INTRODUCTION AND SUMMARY**

KMTP-TV is one of only two African-American controlled public television stations, as well as the only community controlled station. The station's mission is multiculturalism through the promotion of culturally diverse programming, the promotion of public and private sector interests,

and the promotion of community projects. This includes broadcasts of the arts, cultural, informational and entertainment programming by and about African Americans, Asian Americans, Native Americans, Latino Americans, and other minority groups whose cultural needs are underserved. Through these activities, KMTP-TV and MTP strive to reflect and advance cultural diversity in the Bay Area and in the nation. The premise underlying these activities is that diverse programming not only serves to enhance minority communities, but also enriches the majority community.

In terms of staff, budget, operating hours and population covered, KMTP-TV is the smallest of five public television stations in the San Francisco market. Because of its small size and financial constraints, KMTP-TV is not qualified by the Corporation for Public Broadcasting for community service grants. Nonetheless, in 1995, KMTP-TV was lauded as one of five public stations in the country with a distinctive programming format by the 20th Century Fund.

Although KXGR-TV currently has construction status, it is one of the few African American owned commercial television stations in the nation. Further, it is owned 100% by an African American female. The ten-year effort to bring the station to full use is threatened by the allocation plan proposed by the Broadcasters' Caucus.

The Commission's policy proposal to replicate existing service areas for purposes of allocating DTV spectrum is inappropriate, because it will favor VHF stations, perpetuating the competitive disadvantage to UHF stations. This is against public policy and violates the Administrative Procedure Act, 5 U.S.C. § 551, et. seq., regarding the Commission's obligation to make individualized findings in determining the qualifications of each applicant. Further, adoption of the alternative channel allocation plan proposed by the Broadcasters Caucus would be an unlawful

delegation of Commission authority.

## II. REPLICATION OF EXISTING NTSC SERVICE AREAS IS AGAINST PUBLIC POLICY

In the Sixth Further Notice of Proposed Rule Making, the Commission agreed with commenters in the broadcasting industry who argued that replication of existing service areas in the new DTV allotments offered important benefits for both viewers and stations.<sup>1</sup> The Commission should reevaluate this position, because it is partly based on the decades-old NTSC allocation plan of inter-mixing in the same market both superior VHF and inferior UHF channels, thereby condemning UHF stations to an unnecessary and insurmountable competitive disadvantage. Such a disadvantage should not be imported and perpetuated into DTV spectrum.

Most public television stations are in the UHF television band. Replication would import band intermixture disparities into a single band, disadvantaging a class of digital television licensees, including most public stations, for the next technical generation. Similarly, most affiliates of the developing networks, including the WB, are in the UHF band. These affiliates would also face the competitive disadvantage. Competitive disadvantage imposed by technical disparities are not even overcome by superior programming. The Commission can hardly be said to have acted in the public interest if it deprives UHF stations of a real opportunity to serve effectively and competitively in their television markets.

One tendered answer and suggested remedy for this problem is the concept of maximization,

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<sup>1</sup> See In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Further Notice of Proposed Rule Making, adopted July 25, 1996, FCC 96-317 (released August 14, 1996), para. 13.

i.e., small stations could, on an ad hoc basis, seek greater or maximum facilities, provided there is no interference to allocated stations.<sup>2</sup> While this proviso may equalize coverage for some stations in some markets, many spectrum-congested market stations, particularly those in urban areas like San Francisco and Tucson, likely would not be able to satisfy the proviso's technical standards. It would leave to the affected stations the burden of fighting "trench battles" and without any leverage. This would be an inappropriate burden.

This problematic and ineffective concept is best reflected in examining FM and AM spectrum usage. The former is a systematic, principled, and tiered system with minimum/maximum power levels designated to serve community-specific and varied public needs. The latter is an ad hoc, unprincipled scheme serving licensee wishes. The proposed replication concept with its illusory maximization proviso is closest to the AM ad hoc scheme.

Thus, MTP and Sungilt submit that the replication proposal does not serve the needs of stations generally. It essentially disserves the needs of urban UHF and small stations like KMTP-TV and KXGR-TV by depriving them of realistic opportunities to serve and compete. Therefore, we propose that the Commission adopt an allocation system that provides all digital stations-- commercial and public-- with equal and co-terminus coverage areas.

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<sup>2</sup> See Comments by the Public Broadcasting Service and the Association of America's Public Television Stations, filed on November 22, 1996.

### III. GRANTING BROADCAST LICENSES WHOLESALÉ IS VIOLATIVE OF ESTABLISHED POLICY AND FUNDAMENTAL DUE PROCESS

Sections 307, 308 and 309 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (“The Act”), require the Commission to grant permits and licenses only upon specific conditions. These conditions include an application by qualified applicants for specific channels. This process is held against a backdrop of opportunities to compete among applicants. Only upon specific findings as to which applicant would better serve the public interest can the Commission grant permits and licenses. The wholesale grant of licenses to an exclusive class without specific individualized findings violates applicable enabling legislation, the Administrative Procedure Act and fundamental due process.<sup>3</sup>

The Commission’s proposal to replicate existing service areas by pairing channels and granting existing licensees digital channels is inconsistent with established Commission procedure as required by §§ 307, 308 and 309 of The Act. Even though the second digital channel is viewed as a “temporary transitional” channel, the Commission’s intention to allow existing licensees to elect either the current NTSC channel or the transitional channel as a permanent channel is cause for alarm. Thus, superior digital channels may permanently be awarded to a non-applicant competitor without any specific showings or findings of need, service, technical ability to use the channel, or any other public interest considerations. This is an impermissible result according to the Commission’s own rules.

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<sup>3</sup> Ashbacker Radio Co. v. F.C.C., 326 U.S. 327 (1945).

IV. ADOPTION OF THE BROADCASTERS' CAUCUS PLAN WOULD BE A DELEGATION OF THE COMMISSION'S AUTHORITY

On August 1, 1996, the Commission released a proposed table of advanced digital television channel assignments based largely on principles and initial plans developed over the history of this proceeding. The public and affected licensees were afforded multiple opportunities to analyze and comment upon the developing principles that underlie the Commission's channel assignments. Indeed, in January 1995, a group of 100 broadcast organizations ("the Broadcasters Caucus" or "the Caucus") submitted a proposed assignment plan based on principles those groups believed produced optimum results. In constructing its assignment plan, the Commission adopted some but not all of the organization's principles.

Following the release of the Commission's 1996 plan, on November 22, 1996, the Broadcasters Caucus filed with the Commission yet another alternative channel assignment plan, essentially re-submitting those portions of its 1995 plan rejected by the Commission. The Caucus now urges the Commission to adopt its re-submitted alternative plan.

MTP and Sungilt submit that the Commission should not adopt the Caucus plan. As a policy matter, the Commission's previous review of the plan found that it failed to balance adequately the various policy components of this proceeding. And, since the Caucus has provided no new information or arguments nor addressed other Commission concerns, there is no basis for adoption of the Caucus plan. More importantly, adoption of the Caucus plan, based purely on principles and data known only to the Caucus, would constitute an unlawful delegation of Commission authority and would violate the Administrative Procedure Act.

It is still the case that the Caucus plan is biased in favor of major industry stations and



networks. Two illustrations demonstrate this point.

San Francisco, KMTP-TV, channel 32: Under the Commission's plan, the DTV channel for KMTP-TV would be Channel 30. The Caucus plan proposes to shift KMTP-TV from Channel 30 to Channel 29; and, concurrently shift KGO, Channel 7 (an ABC owned/operated station) to Channel 30. KMTP-TV submits that the power differential will simply obliterate KMTP's signal.<sup>4</sup> Since both Channel 7's and Channel 32's transmitting antennas are co-located upon the same tower, we are at a loss to understand the Caucus technical principles. The only logical conclusion is that the Caucus technical principles assume that Channel 30 and engineering transmission principles are licensee sensitive.

Green Valley-Tucson, KXGR-TV, channel 46: Under the Commission's plan, the DTV channel for KXGR-TV would be adjacent Channel 47. The Caucus plan proposes to shift KXGR from Channel 47 to Channel 65. Under the Caucus plan, KXGR would be the only station in the market to operate in the high UHF band. Of course, as one of the highest UHF channels, operations on Channel 65 pose significant and historic technical handicaps and extraordinary costs.

Additionally, although the Caucus has proposed specific digital channels for all licensees, it has also published a listing of alternative channels if a licensee wishes another channel. KXGR-TV notes that the "other available channels" list for Tucson includes VHF channels, but only for existing VHF licensees, not UHF licensees.

The Caucus plan is biased and arbitrary. The failure to disclose and provide information and

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<sup>4</sup> Since November 14, 1996, KMTP-TV has made several written and oral requests to Caucus representatives for explanations and data upon which to evaluate their proposal, but have had no responses.

treat all licensees the similarly taints the entire Caucus plan. Because the Caucus plan is tainted, the Commission may not adopt the Caucus plan. Further, these two illustrations demonstrate why it is necessary for the Commission to require individualized showings prior to the grant of a license.

## V. CONCLUSION

MTP and Sungilt represent two UHF stations in urban markets whose competitive positions in the emerging era of digital television will set the tone for future marketability and growth. Through replication, the Commission proposes to unfairly import the VHF advantage to digital spectrum allocations. Such an outcome is contrary to public policy. Adopting allocation plans proposed by major market station licensees is also against the public interest to the extent that such plans are biased to further hamper competitive efforts by small and UHF stations. As referred to above, UHF stations like KMTP-TV and KXGR-TV are invaluable sources of diverse programming that serves both minority and majority communities. The Commission's 1996 plan should be adopted instead of the Caucus plan, because the Commission has a statutory duty to balance the interests of all market participants and must not delegate this authority to biased third parties.

Respectfully submitted,

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